

No. 50228-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

*GEORGE KARL, REBECCA ANN, and a class
of similarly situated individuals,*

Appellants/Cross-Respondents,

v.

CITY OF BREMERTON,

Respondent/Cross-Appellant.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This appeal is brought by George Karl and Rebecca Ann on behalf of a certified class of individuals (the “Drivers”) who were fined by the City of Bremerton. The Drivers contend that the City had no authority to issue the fines and the fines are illegal for two independent reasons: (1) the City issued the fines based on blue traffic signs that violate state law governing the mandated colors for regulatory traffic signs, and (2) rather than law enforcement officers, the City uses private third-party Imperial Parking employees to issue traffic fines.

The trial court ruled that the City’s blue traffic signs are illegal, but in response to the Drivers’ request for injunctive and monetary relief, the trial court ruled that the Drivers did not have a cause of action. The trial court also ruled that the City can use Imperial Parking employees to issue traffic fines.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its August 5, 2015 order granting the City’s motion to dismiss the Drivers’ request for monetary relief in the form of refunds based on res judicata.

2. The trial court erred in entering its November 3, 2016 order dismissing the Drivers’ claim that the City’s use of private third-party

Impark Parking employees to issue traffic fines violates state law.

3. The trial court erred in entering its March 16, 2017 order granting the City's motion for summary judgment and denying the Drivers' motion for injunctive and monetary relief.

4. The trial court erred in its March 16, 2017 order in finding that the parties had agreed the Drivers' request for injunctive relief based on the illegal blue signs was moot.

5. The trial court erred in entering final judgment and dismissing the action with prejudice on May 3, 2017.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Do the Drivers have a cause of action to challenge the legality of the City's fines when such a cause of action is expressly recognized in the Washington Constitution, Article IV, section 6?

(Assignments of error 1, 3, 5)

2. Does res judicata bar the Drivers from bringing their claims for declaratory relief, injunctive relief, and class-wide monetary relief under state statutes and the Washington Constitution when the municipal court had no jurisdiction to decide the claim or grant the requested relief?

(Assignments of error 1, 3, 5)

3. Does res judicata bar the Drivers from bringing their claims that the City's fines are illegal when such a bar would result in a manifest injustice because the claim raises issues of broad public importance and

the Drivers had no incentive to vigorously litigate such issues over a \$47 fine in traffic court? (Assignments of error 1, 3, 5)

4. Should injunctive relief and monetary relief in the form of damages or restitution be granted to the Drivers because the City had no authority to issue traffic fines based on illegal blue signs? (Assignments of error 1, 3, 5)

5. Did the parties agree that injunctive relief based on the blue traffic signs was moot when class counsel expressly requested injunctive relief both in their motion and in oral argument? (Assignment of error 4)

6. Can the City use private Imperial Parking employees to issue traffic fines when under state statutes only law enforcement officers can issue traffic fines? (Assignments of error 2, 5)

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Bremerton's police department used to contain three civil service "Parking Regulator" positions, which were filled by police department employees in the police civil service. CP 260, 263. Then, in 1998, the City started contracting with a private corporation to issue traffic fines. CP 259-64, 321-22. Since 2011 the City has contracted with Imperial Parking. CP 346.

Under state law regulatory parking signs must have a white background with red or green letters. CP 157-62, 169-73, 192-193.

“Regulatory” parking signs are the type of traffic signs under which a driver can receive a fine. *Id.* For example, no parking signs and 2-hour parking signs are regulatory signs. CP 192-93.

In contrast, state law mandates that non-regulatory informational or general service signs have a blue background with white letters. CP 157-62, 169-73, 194-195. Examples of these informational signs include those indicating gas and food are available or a hospital is nearby. CP 194-95. The colors used in traffic control devices have a profound impact on their effectiveness because of the inherent power of color to bring things such as roadway signs to the attention of motorists. CP 214-15.

In the early 2000s, the City of Bremerton decided to change some of its regulatory parking signs, but not all, to blue with white letters as part of a “branding effort[.]” CP 234, 237, 324-25, 372. The City decided on “Bremerton blue” signs in its downtown core for “aesthetic reasons.” *Id.* Former Mayor Cary Bozeman stated that it was “distinct color [that] would set Bremerton apart from other cities, and it’s attractive.” *Id.*

In August 2014, plaintiffs George Karl and Rebecca Ann parked their motorcycles on 2nd Street in the City of Bremerton. CP 24. They received traffic fines issued by Imperial Parking employees based on the blue parking signs. *Id.*

In October 2014 Karl went to Bremerton Municipal Court to contest the parking infraction. CP 25. Karl was not represented and could not pay a

lawyer to defend his \$47 ticket. *Id.* Karl was unsuccessful, and it would have cost Karl a \$230 filing fee to appeal the \$47 municipal fine in Superior Court. CP 68, 70.

Karl sought to obtain a lawyer to deal with this problem, but was rejected due to the low case value of an individual challenging a \$47 fine and the uncertain value as a class action. CP 25. Karl eventually obtained counsel after great effort. *Id.*

Karl's counsel later learned through documents provided in response to public records act requests that Bremerton Municipal Court Judge James Docter made an email inquiry to the Washington Municipal Research and Service Center (MRSC) concerning Karl's challenge to the parking violations shortly after Karl's hearing. CP 11-16. Judge Docter's question was whether the Manual on Uniform Traffic Control Devices ("Manual") includes mandates on the color of traffic signs. CP 16. MSRC forwarded Judge Docter an email from the City of Puyallup's Street Supervisor that said Puyallup follows the Manual for traffic signs. CP 15-16.

Judge Docter then asked MSRC, and Bremerton City Attorney Roger Lubovich, whether the Manual is adopted as Washington law. CP 15. City Attorney Lubovich told Judge Docter that the Manual is Washington law because it is "adopted by WAC 468-95-010[.]" CP 15. Judge Docter then replied to City Attorney Lubovich, pointing to, and quoting, RCW 47.36.030: **"Traffic devices hereafter erected within incorporated cities and towns**

shall conform to such uniform state standard of traffic devices so far as is practicable.” CP 14 (Judge Docter’s emphasis). The City then continued to fine the Drivers under the blue traffic signs. CP 12.

B. PROCEDURAL HISTORY

After eventually finding a law firm to pursue his claim, in March 2015 Karl filed a class action complaint against the City of Bremerton. CP 1-5. Karl sought on behalf of a class (the “Drivers”) declaratory and injunctive relief and the incidental damages that flow directly from that declaratory and injunctive relief. CP 4.

After Karl filed the complaint, the City moved to dismiss the complaint under CR 12(b)(6). CP 6-10. The trial court denied in part and granted in part the City’s motion to dismiss. CP 658-61. The trial court said that the Drivers’ request for injunctive and declaratory relief were not within the jurisdiction of the Municipal Court and therefore not barred by res judicata. CP 559-60. The trial court concluded, however, that the Drivers’ request for a refund was barred by res judicata. CP 660-61.

Karl then filed a motion for clarification and reconsideration. CP 46-52. Karl asked the trial court to clarify that the bar on refunds only applied to him and not the potential class members who had never appeared in municipal court. CP 49-50. The trial court ruled that whether class members could obtain monetary relief under CR 23(b)(2) was a question for class certification, which had not yet occurred. CP 664. The

trial court also ruled that “Plaintiffs are not barred from seeking damages, but will need to prove what damages, if any, flow from the City’s particular color of parking sign and third-party enforcement.” CP 665.

After the City filed its answer, CP 72-74, Karl filed a motion to certify the class. CP 75-90. The City did not object to class certification for declaratory and injunctive relief, CP 118, but objected to class certification for monetary relief. CP 118-120.

The trial court then certified the class under CR 23(b)(2). CP 640-41. The trial court found certification correct under CR 23(b)(2) because the Drivers sought declaratory and injunctive relief, and the monetary relief sought by the Drivers flowed directly from that declaratory and injunctive relief:

Plaintiffs contend that the City’s practices violate state law. They seek a ruling that the City’s practices are illegal and an injunction to remedy these alleged violations of the law. They also seek for themselves and the class restitution of the allegedly unlawful fines. Monetary relief is available in cases certified under CR 23(b)(2) where the money damages are incidental to the injunctive relief. Any monetary relief here flows mechanically from the injunctive and declaratory relief sought in this case. The monetary relief due any individual class member can be objectively computed from the amount any individual class member was fined and is therefore incidental.

CP 640. The trial court further found that “[a] class action is the only way that class members may obtain relief.” *Id.*

The trial court defined the certified class as all individuals who

were ticketed or who will be ticketed in the future based on the City's blue traffic signs and/or the City using private contractors to issue traffic fines. CP 640. The class period includes the time from March 2012 and continues to the completion of the action. *Id.*

After the trial court certified the class, the City filed a motion for summary judgment on the Drivers' claims. CP 125-132, 241-51. The Drivers filed a cross-motion for partial summary judgment, which requested that the trial court declare the blue signs illegal and order the City to remove the illegal signs. CP 156-67. In response to the City's motion concerning the City using private employees to issue traffic fines, the Drivers asked the trial court to issue summary judgment for them as the non-moving party because the facts are not in dispute and the issue is a matter of law. CP 291-92.

The trial court decided that the legislature has not prohibited municipalities from delegating limited enforcement authority to private contractors. And the trial court said that the City's use of private employees to issue traffic fines does not conflict with any statute and therefore is not unlawful. CP 634. The trial court granted the City's motion for summary judgment on this issue. CP 635.

The trial court also decided that the City's blue parking signs "do not substantially comply with the Manual [state law] or statutes adopting its application." CP 625. The trial court granted the Drivers' motion that

the City's blue parking signs violate state law. CP 634. The trial court, however, denied the Drivers' request for injunctive relief. CP 634. The trial court said it was unsettled whether the Drivers had an "actionable claim" or "cause of action" and further briefing was needed. CP 625-30, 635. After the trial court's ruling, the City commenced replacing the unlawful blue signs with signs that comply with state law. CP 494.

After the trial court's request for further briefing, the City filed a motion to dismiss. CP 489-92. The Drivers moved for partial summary judgment, requesting that the trial court order the City pay the damages and/or restitution that flow directly from its November 2016 order that the City's blue parking signs violate the law. CP 498-521. The Drivers also requested injunctive relief to prohibit the City from collecting unpaid fines and/or penalties from class members. CP 498.

In March 2017, the trial court said that the Drivers' "claim for injunctive relief is now moot" because the City told the Court that it had replaced all of the illegal blue signs (CP 551, 616), even though the Drivers sought injunctive relief to prohibit the City from continuing to collect fines and penalties based on the blue signs. CP 498, 521. The trial court also ruled that the Drivers "have not established that a cause of action exists for declaratory relief by which they may challenge the Defendant's use of non-compliant parking signage." CP 619. The trial court therefore denied the Drivers' motion for monetary relief. *Id.*

The Drivers then appealed. CP 612; CP 649. The City cross-appealed the trial court's order certifying the class. CP 636.

IV. SUMMARY OF ARGUMENT

Just as individuals must follow the law or they may be fined, municipalities must also follow the law if they want to fine individuals. Here, in response to the City's arguments, the trial court entered a series of inconsistent decisions. The trial court first decided that the Drivers' request for relief in the form of a refund was barred by res judicata, but that the Drivers could seek declaratory and injunctive relief. On reconsideration, the trial court decided that the Drivers could obtain damages, and the trial court subsequently certified the class under CR 23(b)(2) and ruled that the Drivers could obtain declaratory and injunctive relief and the damages flowing from that relief.

The trial court then granted the Drivers' motion on the merits that the City's blue traffic signs violate state law, and the trial court dismissed on the merits the Drivers' claim that the City's use of private Impark Parking employees to issue traffic fines violates state law. After ruling on the merits, and in response to the Drivers' request for relief in the form of damages and/or restitution, the trial court ruled that the Drivers had no cause of action and it entered final judgment for the City.

The trial court erred. Under the Washington Constitution Article IV, section 6, the Drivers have a cause of action to challenge the

legality of the City's fine. And res judicata does not apply as a matter of law because the municipal court had neither jurisdiction to decide the Drivers' claim nor jurisdiction to provide the Drivers the relief they request in this action. It would also be a manifest injustice to hold res judicata or collateral estoppel applies here because the Drivers had no financial incentive to vigorously litigate the \$47 fine in traffic court and the Drivers' claim presents broad issues of public importance, *e.g.*, can a City contract out law enforcement to third-party corporations.

On the merits, the trial court correctly ruled that the City's blue traffic signs violate state law, but the trial court erred in not granting the Drivers injunctive relief and monetary relief in the form of damages or restitution. The City should not profit from its wrongdoing here, particularly when it knew its blue traffic signs violate state law and it continues to seek outstanding fines from the Drivers based on those signs.

The trial court also erred when it ruled that the City can use third-party Imperial Parking employees to issue traffic fines. Law enforcement must be conducted by public employees in civil service unless there is a specific statutory exemption. There is no legislative authority for the City to contract with a private corporation to conduct law enforcement.

Under the trial court's orders, cities throughout the state can issue illegal fines but no individual can ever bring an action in superior court to have the fines declared unlawful, enjoin the fines, or obtain relief for those

individuals illegally fined. The trial court erred in multiple ways and this Court should reverse.

V. ARGUMENT

A. THE STANDARD OF REVIEW IS DE NOVO.

The Drivers' case was dismissed in a series of summary judgment rulings that are reviewed de novo. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004); *Atl. Cas. Ins. Co. v. Oregon Mut. Ins. Co.*, 137 Wn. App. 296, 302, 153 P.3d 211 (2007) (“[L]egal questions like res judicata and a superior court's jurisdiction [are reviewed] de novo.”).

B. THE TRIAL COURT ERRED WHEN IT DECIDED THAT THE DRIVERS HAD NO “CAUSE OF ACTION” AND RELIEF WAS BARRED BY RES JUDICATA.

1. The Drivers Have a Cause of Action Under the Constitution to Challenge the Legality of the City's Fine, as Our Supreme Court has Repeatedly Held.

The Drivers brought this action in superior court alleging that the City had unlawfully fined them for two reasons: (1) the City fined the Drivers based on blue traffic signs that violate state law, and (2) the City uses private third-party Imperial Parking employees, rather than law enforcement officers, to issue traffic fines.

The trial court then proceeded to rule on the merits of both claims. The trial court granted the Drivers' motion for partial summary judgment that the City's blue traffic signs violate state law. CP 634. The trial court also

dismissed on the merits the Drivers' claim that the City is violating state law by using private Imperial Parking employees to issue traffic fines. CP 635.

After ruling for the Drivers on the merits of their claim that the City's blue parking signs violate state law, and in response to the Drivers' request for relief, the trial court dismissed the Drivers' claim based on its conclusion that the Drivers "had not established a cause of action exists for declaratory relief by which they may challenge the Defendant's use of non-compliant parking signage." CP 609. The trial court made this ruling *after* the City conceded that the Drivers had "prevail[ed] on the declaratory judgment claim." CP 492.¹

The trial court agreed with the City that the Drivers did not have a "private right of action" under the Manual.² CP 244-47. The trial court ruled that the Drivers did not have a cause of action because it said "[t]he applicable statutes do not expressly provide an avenue by which individuals can bring a cause of action against a municipality," *i.e.*, no individual has a cause of action in superior court regarding the legality of the City's fines based on illegal signs. CP 606.

The trial court erred because the Washington Constitution expressly provides a cause of action in cases involving the legality of a municipal fine

¹ The Drivers sought declaratory relief in accordance with CR 23(b)(2).

² The Manual on Uniform Traffic Control Devices (the Manual) contains mandatory standards for the design of traffic devices including signs and is incorporated into Washington law. RCW 47.36.030; WAC 468-95-010

and a superior court has “original jurisdiction” over that cause of action. Const. art. IV, § 6. Whether the Manual created a separate “private right of action” is irrelevant because the Drivers are challenging the legality of the City’s traffic fines under the cause of action provided by the Constitution.

The Supreme Court recently held that the state constitution recognizes a cause of action for a challenge to the legality of a municipal fine and the superior court has original jurisdiction to decide the matter. *New Cingular Wireless v. City of Clyde Hill*, 185 Wn.2d 594, 600, 374 P.3d 151 (2016), citing Const. art. IV, § 6; *accord, ZDI Gaming Inc. v. State*, 173 Wn.2d 608, 616-17, 268 P.3d 929 (2012).

In *New Cingular* the Supreme Court quoted the Constitution (185 Wn.2d at 600, quoting Const. art. IV, § 6):

The superior court shall have *original* jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or *municipal fine*[.] (Supreme Court’s emphasis.)

The Supreme Court held that “[u]nder this provision, *original jurisdiction is established for the causes of action listed and judicial action lies in superior court.*” *Id.* (emphasis added).

In *ZDI Gaming*, our Supreme Court held that “jurisdiction is a fundamental building block of law” and “[o]ur state constitution uses the term ‘jurisdiction’ to describe the fundamental power of courts to act.” 173 Wn.2d at 616. The Supreme Court ruled that “[s]uperior courts have original

jurisdiction in the *categories of cases listed* in the constitution, which the legislature cannot take away.” *Id.* at 616-17 (emphasis added). Superior courts have original jurisdiction over the “categories of cases” or “causes of action” listed in the Constitution, including cases involving the legality of a municipal fine, and the legislature cannot take away that jurisdiction. *Id.*; *New Cingular*, 185 Wn.2d at 600.³

The City’s argument and the trial court’s ruling that the Drivers do not have a “private right of action” under the Manual are incorrect because the Drivers are not suing under the Manual. The Drivers are alleging that the City’s parking fines violate state law, specifically RCW 46.61.050 and WAC 308-330-409 which prohibit enforcement of parking regulations without the presence of an official sign, and RCW 46.63.030 which only allows law enforcement officers to issue traffic fines.⁴ Thus, the Drivers are challenging the legality of the City’s parking fines under state law by exercising their

³ Consistent with the cause of action under the Constitution, there have been many other cases challenging the legality of taxes, assessments, and municipal fines in the superior courts. See, e.g., *Carrillo v. Ocean Shores*, 122 Wn. App. 592, 599, 94 P.3d 961 (2004) (class action concerning charges for water and sewer that violated state law); *Dore v. Kinnear*, 79 Wn.2d 755, 766, 489 P.2d 898 (1971) (class action concerning taxes assessed in violation of state law); *Covell v. Seattle*, 127 Wn.2d 874, 877, 891-92, 905 P.2d 324 (1995) (class action concerning unlawful street utility charges); *Okeson v. Seattle*, 150 Wn.2d 540, 546, 78 P.3d 1279 (2003) (class action concerning street light charges assessed against ratepayers that violated state law); *Okeson v. Seattle*, 159 Wn.2d 436, 447, 150 P.3d 556 (2007) (class action concerning payments to utilities to lower greenhouse gas emissions charged to rate payers in violation of state law); *Burman v. State*, 50 Wn.App. 433, 437, 749 P.2d 708 (1988) (class action concerning traffic infraction late fees that were in excess of the amount that state law allowed).

⁴ The City’s violation of these statutes is discussed *infra* at 26-40.

express right under the Constitution to bring an action challenging those fines in superior court. Const. art. IV, § 6.⁵ Further, the result of the trial court's decision -- superior courts cannot review fines that violate state law -- renders meaningless the Constitution's grant of jurisdiction to the superior court over cases regarding the legality of municipal fines.

The City's argument that the Drivers have no "private right of action" under the Manual is a red herring because it ignores the express provision in the Washington Constitution providing the Drivers a cause of action to challenge the legality of the City's fines. The Court should thus reverse the trial court's decision that the Drivers had no "cause of action."

2. Res Judicata Does Not Apply Here Because the Municipal Court Had No Jurisdiction over the Drivers' Claims; Instead, Only the Superior Court Has Original Jurisdiction over the Claims Challenging the Legality of the City's Fines.

After the trial court granted the Drivers' motion for partial summary judgment in which they argued that the City's blue parking signs violate state law, the City moved for summary judgment on the basis that the Drivers'

⁵ The City's "private right of action" argument below was primarily based on federal and state tort cases where the Manual did not create a new right of action outside of a negligence action. CP 245-46. An alleged violation of the Manual (state law) can be used by an individual as evidence of negligence in a negligence action. *CSX Transp. v. Easterwood*, 507 U.S. 658, 668-69 (1993) (Manual does not preempt and displace the law of negligence in each state). While the Manual did not create a new private right of action, the lack of a new right of action did not eliminate existing causes of action, *i.e.*, a negligence action. *Id.* Here, the Drivers are also not bringing a private right of action under the Manual, but are instead suing the City under an existing cause of action provided by the state constitution to challenge the City's fines on the basis they violate state law (including, but not limited to, the state statutes adopting the Manual).

claims were barred by res judicata. CP 546-48. The trial court ruled that “[r]es judicata prevents class members from pursuing refunds of fines in avenues outside of direct appeal,” *i.e.*, the Bremerton Municipal Court judgment precluded the Drivers from bringing an action in superior court. CP 609. The trial court erred because res judicata does not apply when a plaintiff brings a claim over which the first court (the Bremerton Municipal Court) does not have jurisdiction.

Res judicata is a judicially created doctrine that bars the relitigation of claims that were raised or should have been raised in an earlier proceeding. *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 331 (1997). Claim-splitting by either plaintiffs or defendants thus implicates res judicata, *e.g.*, defendants are required to assert compulsory counter-claims. *Id.* at 328; *Noel v. Hall*, 341 F.3d 1148, 1167-68 (9th Cir. 2003) (applying Washington law).

Res judicata, however, does not bar claims (causes of action) in a second proceeding that could *not* have been brought in the first proceeding due to a court’s limited jurisdiction in that first proceeding. *Kelly-Hansen*, 87 Wn. App. at 330-32 (“[O]ne cannot say that a matter should have been litigated earlier if, for some reason, it could not have been litigated earlier,...thus, res judicata will not operate if the matter was an independent claim not required to be joined.”) This is largely because “implicit in the rules of res judicata are several important assumptions” including the assumption that the first and second courts “are both courts of general

jurisdiction” and that the two courts are “of equal judicial dignity.”

Restatement (Second) of Judgments, Introductory Note, Ch. 6 (Oct. 2016 Update).⁶ Thus “the question of res judicata can be stated as being whether the judgment should be given preclusive effect by *the very court* that rendered it.” *Id.* (emphasis added).

The Restatement recognizes that the bar does not apply when the first court’s limited jurisdiction prevented it from entertaining a certain remedy or form of relief (*Id.* at § 26(1)(c)):

[Res judicata does not apply when the] plaintiff was unable to rely on a certain theory of the case or to seek a remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief[.]

Consistent with the Restatement, our Supreme Court has held that res judicata does not apply when the first judgment is from a court of limited jurisdiction without jurisdiction over the current claim. For example, in *Centennial Flouring Mills Co. v. Schneider*, 16 Wn.2d 159, 132 P.2d 995 (1943), the Supreme Court considered whether the plaintiff employer was barred from bringing a claim in superior court against employees when the employees had previously brought actions in a justice of the peace court

⁶ Washington courts frequently rely on the Restatement for the rules governing res judicata. See, e.g., *Dot Foods, Inc. v. State, Dep’t of Revenue*, 185 Wn.2d 239, 256, 372 P.3d 747 (2016); *OneWest Bank v. Erickson*, 185 Wn.2d 43, 57, 367 P.3d 1063 (2016); *In re Estate of Hambleton*, 181 Wn.2d 802, 834-35, 353 P.2d 398 (2014).

concerning the same set of facts. *Id.* The employer was not barred by res judicata because it was “impossible for plaintiff [employer] to assert in the justice court actions by way of cross-complaint, or otherwise, its causes of action against the six employees.” *Id.* at 160.

Based on our Supreme Court’s earlier decision in *Centennial Flouring Mills*, the Ninth Circuit held in a case applying Washington law that “[i]f a counterclaim cannot properly be pleaded” because of the limited “jurisdiction of the state court, a judgment in that suit will not preclude a defendant from bringing a separate action.” *Noel*, 341 F.3d at 1171, citing *Centennial Flouring Mills*, 16 Wn.2d 159, and 3A Orland and Tegland, *Washington Practice* § 303 (4th ed. 1992).

As a court of limited jurisdiction, the municipal court only has jurisdiction as provided by statute. *State v. Ulhoff*, 45 Wn. App. 261, 263, 724 P.2d 1103 (1986); Const. art. IV, § 12. In a traffic infraction proceeding, municipal courts therefore only have jurisdiction to “determine whether the civil infraction was committed.” RCW 7.80.100. The municipal court *does not* have jurisdiction over claims for declaratory or injunctive relief, or over claims involving the legality of a municipal fine -- the only relief that an individual could obtain in municipal court would be a dismissal of the infraction. The Drivers therefore could not have litigated this action earlier because it was impossible to obtain the relief sought in this action in the municipal court.

In addition, there is no res judicata bar to independent litigation in superior court under state law, even though the “factual basis for a claim is related to enforcement of a municipal ordinance”. *Orwick v. City of Seattle*, 103 Wn.2d 244, 252, 692 P.2d 793 (1984). The Supreme Court explained (*id.*) (citation omitted):

The relevant consideration for determining jurisdiction is the nature of the cause of action and the relief sought.

Here, petitioners allege system-wide violations of the statutory requirements in RCW 46.63 and state and federal constitutional violations. *Petitioners’ claim for injunctive and declaratory relief is based on their rights under a state statute and the state and federal constitutions. These claims do not “arise under” a municipal ordinance and, therefore, are not with the exclusive jurisdiction of the Seattle Municipal Court.* (Emphasis added.)

Similarly, the Drivers are challenging the City’s traffic fines because they violate state law. The Drivers’ action in superior court, while having the same factual basis as the infraction proceedings, do not “arise under” a municipal ordinance and are not within the jurisdiction of the Bremerton Municipal Court.

A municipal court decision is thus not final and binding with respect to the Drivers’ rights under state law because the Washington Constitution (Const. art. IV, § 6) gives the superior court *original* jurisdiction in cases challenging, under state law, the legality of a municipal fine. *Orwick*, 103 Wn.2d at 251-52, 257; *New Cingular Wireless*, 185 Wn.2d at 616-17.

Because the Constitution grants the Drivers’ the right to bring an

action in superior court challenging the legality of a municipal fine under state law and the municipal court only had jurisdiction to “determine whether the civil infraction was committed,” there is no res judicata bar to the claims that the City’s fines violate state law and requests for declaratory relief, injunctive relief, and a class-wide monetary remedy. *Orwick*, 103 Wn.2d at 692; *Centennial Flouring Mills*, 16 Wn.2d at 165-66; *Noel*, 341 F.3d at 1171; Restatement (Second) of Judgments, §§26(1)(c), 85.

3. Even Assuming *Arguendo* that Res Judicata Could Potentially Bar the Drivers’ Claims, It Would Be Manifestly Unjust To Apply Res Judicata in this Action.

Even assuming *arguendo* that this case were merely a relitigation of the infraction proceeding initiated by the City, the municipal court decision does not foreclose this class litigation. Res judicata, like collateral estoppel, should not be applied to work an injustice. *Henderson v. Bardahl International Corp.*, 72 Wn.2d 109, 119, 431 P.2d 961 (1967); *Kennedy v. Seattle*, 94 Wn.2d 376, 378, 612 P.2d 713 (1980). “There is nothing...in the doctrine [of res judicata] or in its historic application which encourages the court to so apply it as to ignore principles of right and justice...” *Luisi Truck Line v. Wash. Utilities & Transp. Comm’n*, 72 Wn.2d 887, 896, 435 P.2d 654 (1967). See also *Henderson*, 72 Wn.2d at 119 (“No legal principle...should ever be applied to work injustice. It is generally recognized that the doctrine of res judicata is not to be applied so rigidly as to defeat the ends of justice.” [parenthetical omitted]). *Accord*, *Personal Restraint of Metcalf*, 92 Wn. App

165, 174, 963 P.2d 911 (1998) (“Res judicata should not be applied when it would work an injustice.”).

Here, if any individual class member won a dismissal in municipal court, the decision would not impact any other case or the City. Indeed, even in a contested criminal matter, a municipal court’s decision is not binding on the City and does not bar relitigation of important legal issues. *Kennedy v. Seattle*, 94 Wn.2d at 378. In *Kennedy*, the plaintiff argued that Seattle could not relitigate the validity of its houseboat moorage ordinance because a “municipal court judge ruled that the ordinance was unconstitutional” when dismissing a charge against plaintiff for violating the ordinance. *Id.* The Supreme Court ruled that the municipal court decision was not a bar to relitigation because it would be unjust to others affected by the ordinance and because important questions of law are not barred by unappealed municipal court decisions. *Id.* The Supreme Court explained (*id.* at 378-79):

There are a number of requirements for the application of the doctrine of collateral estoppel. We need consider only one: that application of the doctrine must not work an injustice. It would be manifestly unjust not only to litigants Kennedy and McGuire but to other houseboat and moorage owners for the constitutionality of the houseboat ordinance to be determined by a municipal court ruling unappealed by the City. Furthermore, the re-litigation of an important public question of law such as the validity of the houseboat ordinance should not be foreclosed by collateral estoppel. (Citations omitted, emphasis added.)

Similarly, if Karl or any one of the thousands of class members prevailed in municipal court, he or she would only obtain a dismissal of the infraction

proceeding and that would have no impact on other infractions, nor would it require a change in the City's practices to comply with state law.

Further, because the Drivers had such small personal stakes (\$47), it would be unjust for res judicata to allow the City to continue violating state law as the Supreme Court explained in *Hadley v. Maxwell*, 144 Wn.2d 306, 312, 27 P.3d 600 (2001):

To determine whether an injustice will be done, respected authorities urge us to consider whether "the party against whom the estoppel is asserted interests at stake that would call for a full litigational effort." 14 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Trial Practice, Civil* § 373, at 763 (5th ed.1996); see also *Parklane*, 439 U.S. at 330, 99 S.Ct. 645 (holding incentive to vigorously contest cases with small or nominal damages at stake could be a reason not to apply collateral estoppel); *Beale v. Speck*, 127 Idaho 521, 903 P.2d 110, 119 (1995) (holding collateral estoppel for misdemeanor traffic offenses generally inappropriate); *Rice v. Massalone*, 554 N.Y.S.2d 294, 160 A.D.2d 861 (1990) (holding collateral estoppel inappropriate after an administrative determination of liability for a traffic accident). Applying that analysis, the incentive to litigate was low - Maxwell was at risk \$95.

The plaintiff's stake in the initial litigation in *Hadley* was too small for the Court to bar relitigation, only \$95, because Maxwell would not have put in a full litigational effort over such a small amount.⁷

⁷ In *Hadley* the Supreme Court noted that in 1981 Washington joined other states in decriminalizing minor traffic offenses in order to have a "more expeditious system for handling minor traffic cases[.]" *Hadley*, 144 Wn.2d at 312 (citation omitted). The "reform also established a schedule of monetary penalties" and the "fee schedule has led critics to analogize this system to a 'cafeteria,' each infraction coming with a preestablished price." *Id.* at 313. "Critics contend the system creates too great an incentive to simply pay the fine rather than incur the time and expense to resist, whether or not the infraction was actually committed." *Id.* Therefore, "[m]ost jurisdictions have
(continued)

Here, similarly, the Drivers also had a stake that was too small (\$47) to call for a full litigational effort. Indeed, it would have cost almost five times the amount of the fine, \$230, to appeal the municipal court's decision in superior court, let alone the time and other expenses involved. CP 68, 70. The trial court said that *if* Karl had prevailed in superior court he could have recovered his fees and costs (CP 618), but the undisputed evidence is Karl could not obtain an attorney for a \$47 fine (CP 25) and "only a lunatic or fanatic sues for \$30." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 855, 161 P.3d 1000 (2007) (citation omitted).⁸

Because the system for traffic infractions is designed for expediency and to encourage individuals to pay a nominal or "cafeteria" style fee rather than litigate the matter in court, it makes financial sense for an individual to simply pay the nominal fine rather than incur the costs and time to appear in traffic court to contest the fine. *Hadley*, 144 Wn.2d

refused to admit traffic misdemeanors in subsequent civil cases, let alone allow them to be the basis for collateral estoppel." *Id.*

⁸ In a case involving settlement of criminal charges more serious than the traffic infractions here, the Court of Appeals held that collateral estoppel did not apply in a subsequent civil action. *Safeco Ins. Co. v. McGrath*, 42 Wn.App. 58, 208 P.2d 657 (1985). The Court held that collateral estoppel did not apply because the defendant had not had a "full and fair opportunity" to litigate the issues and the "application of the doctrine would work an injustice under these facts." *Id.* at 63.

Because a guilty plea "reflect[s] only a compromise or a belief that *paying a fine is more advantageous than litigation*." *Id.* at 64 (emphasis added; citation omitted).

"Considerations of fairness to civil litigants and regard for the expeditious administration of criminal justice combine to prohibit application of collateral estoppel against a party who, having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action." *Id.* (citation omitted); accord, *Clark v. Baines*, 150 Wn.2d 905, 916, 83 P.3d 245 (2004) ("an *Alford* plea cannot be said to be preclusive of the underlying facts and issues in a subsequent civil action").

at 312-13; RCW 7.08.005 (the “system of civil infractions is a more expeditious” method for dealing with minor violations).

The Drivers’ claims here also raise issues of substantial public importance and the Drivers had no financial incentive to vigorously litigate these issues in municipal court. *Kennedy*, 94 Wn.2d at 378; *Hadley*, 144 Wn.2d at 312. In addition to res judicata not barring a second action bringing claims not within the jurisdiction of the court hearing the first action, res judicata also does not apply because it would result in a manifest injustice.

**C. BREMERTON LACKED AUTHORITY TO ISSUE FINES
BASED ON ITS UNLAWFUL BLUE SIGNS.**

The trial court agreed with the Drivers that the City’s blue parking signs “do not substantially comply with the Manual [state law] or statutes adopting its application.” CP 625. The trial court granted the Drivers’ motion that the City’s blue parking signs violate state law. CP 634.

After the trial court ruled the City’s blue parking signs violate state law, *id.*, the Drivers moved for partial summary judgment on liability and damages because the City did not have authority to impose parking fines based on blue signs that violate state law. CP 496-504. In the City’s opposition, the City did not dispute the merits of the Drivers’ argument. CP 570-77. Rather, the City argued there were procedural bars preventing the Drivers from obtaining relief, even though it replaced the blue signs in

response to the trial court's previous ruling. *Id.*; CP 551.

The trial court declined to rule on the Drivers' arguments and instead, after already ruling the City's blue signs violate state law, the trial court ruled the Drivers did not have a cause of action. CP 619. In addition to incorrectly ruling that the Drivers do not have a cause of action, see discussion *supra* at 12-16, the trial court erred by not granting partial summary judgment to the Drivers on liability because the City lacked authority to issue fines based on illegal blue parking signs.

Under Washington law, no limitation on parking is "effective" unless "official traffic control devices" are in place at the time. WAC 308-330-409 ("No prohibition, regulation, or limitation relating to stopping, standing, or parking. . . shall be effective unless *official traffic control devices* are erected and in place at the time of any alleged offense." (Emphasis added.)). This rule, that a sign-based regulation regarding parking is not effective unless official traffic control devices are in place, is adopted as part of the Bremerton Municipal Code ("BMC"). BMC §10.04.010.⁹

With regard to overtime parking, a driver has no general duty to not park on public streets for longer than two hours. This differs from a driver's

⁹ The trial court, in its order dismissing the Drivers' claims, incorrectly stated that the Drivers did not allege that the City violated the Bremerton Municipal Code. However, the Drivers actually noted in their motion and at oral argument that the City was violating its own ordinance. CP 500 (Drivers' motion showing violation of ordinance) and VRP 02/06/17 at 7 (class counsel: "The Bremerton Municipal Code says that the City has no authority to issue a ticket unless there is an official traffic control device in place.").

duty to not park in front of a crosswalk or a fire hydrant. RCW 46.61.570 (1)(a)(i); -(b)(ii). Those duties always apply with or without official signs. However, an overtime parking violation is, statutorily speaking, a driver failing to obey an official sign. RCW 46.61.050 creates this duty, stating the “driver of any vehicle. . . shall obey the instructions of any *official traffic control device*. . . ” (Emphasis added.) Thus, the City can ticket drivers who disobey a two-hour parking limit only when the City has installed an official sign, which complies with state law color standards, that communicates the limitation. WAC 308-330-409; RCW 46.61.070; BMC §10.04.010.

Here, the City’s blue parking signs do not qualify as *official traffic control devices* and cannot serve as the basis for imposing traffic fines because they do not meet state law standards on uniformity. A sign must be consistent with RCW Title 46 and 47 in order to be an official traffic control device under Washington law. RCW 46.04.611; RCW 46.98.020; RCW 47.98.020. Under these statutes “[o]fficial traffic-control devices means all signs, signals, markings and devices *not inconsistent with Title 46 RCW* placed or erected by a public body or official having jurisdiction, for the purpose of regulating, warning or guiding traffic.” RCW 46.04.611 (emphasis added). Title 46 RCW is expressly “construed in pari materia with the provisions of Title 47 RCW, and with other laws relating to highways, roads, streets, bridges, ferries

and vehicles.” RCW 46.98.020.¹⁰ Thus, Washington law requires that signs be consistent with both RCW Title 46 and 47. And the trial court ruled the City’s “blue parking signs do not substantially comply with the Manual or the statutes adopting its application.” CP 625, 634.

Because blue parking signs violate RCW 47.36.030 and WAC 468-95-010, which require cities to erect signs in accordance with the standards in the Manual, the signs are necessarily inconsistent with RCW Title 46 and Title 47.¹¹ The inconsistent signs are not “official” and the City did not have authority to impose traffic fines based on those signs because “no prohibition... shall be effective unless official traffic control devices are erected and in place at the time of any alleged offense.” WAC 308-330-409.

Consistent with the Washington statutory scheme regarding traffic signs, courts in other jurisdictions have consistently held regulatory traffic signs that do not comply with the Manual are not official traffic signs and therefore unlawful and unenforceable. *State v. Adams*, 140 N.W.2d 847, 849 273 Minn. 228 (Minn. 1966). In *Adams*, the Supreme Court of

¹⁰ Likewise, Title 47 RCW “shall also be construed in pari materia with the provisions of Title 46 RCW, and with other laws relating to highways, roads, streets, bridges, ferries and vehicles.” Because Title 46 and 47 are in pari materia, they must be construed together. “The significance of statutes being in pari materia is that they ‘must be construed together ... [A]ll acts relating to the same subject matter or having the same purpose, should be read in connection therewith as together constituting one law.’” *Personal Restraint of Yim*, 139 Wn.2d 581, 591-92, 989 P.2d 512 (1999) (citation omitted).

¹¹ RCW 47.36.030 provides that “traffic devices [including signs] hereafter erected within incorporated cities and towns *shall conform* to such uniform state standard of traffic devices,” *i.e.*, the Manual. (Emphasis added).

Minnesota held that a wrongly colored traffic sign did not “substantially comply” with the Minnesota law, which just as in Washington (and other states) incorporated the Manual, and was unenforceable because it was not an official traffic sign. *Id.* at 849; *accord*, *State v. Trainer*, 670 N.E.2d 1378, 79 Ohio Misc. 2d 62 (Ohio Mun. 1995) (where park authorities posted a speed limit sign in “rustic format” for “aesthetic reasons” the sign was not an “official sign” because it violated the Manual and it therefore did not comply with the requirements of Ohio law. “Accordingly, this being a government of laws . . . , the court finds the defendant not guilty of speeding and orders him discharged.”); *City of Maple Heights v. Smith*, 722 N.E.2d 607, 610, 131 Ohio App. 3d 406 (Ohio Ct. App. 1999) (“Even a cursory review of these statutes [Ohio statutes regarding official traffic control devices] would suggest that the city could not criminally enforce the violation of a traffic control device which is not compatible with the uniform code prescribed by OMUTCD [Ohio Manual on Uniform Traffic Control Devices].”); *City of Chicago v. Myers*, 242 N.E.2d 14, 100 Ill. App. 2d 87 (Ill. Ct. App. 1968) (sign prohibiting left turn that did not conform to the size and color requirements of the Manual was not an official sign as required by law and individual could not be convicted under such sign); *City of Madison v. Crossfield*, 2016 WL 635158, ¶¶19-23 (Wisc. Ct. App. 2016) (“City bears the burden of showing [a driver] disobeyed the instructions of an ‘official traffic sign’” which is a sign that

must comply with the Manual)¹²; *Commonwealth v. Lee*, 10 Pa. D. & C. 692, 698, 18 Beaver 234, 48 Mun.L.R. 295 (Penn. Quar. Sess. 1957) (“[R]egulation [was] not enforceable against defendant” because “no official signs” were present, only signs that did not comply with state law standards).

The situation is the same here. The trial court ruled that the City’s blue parking signs do not comply with state law. The City’s blue parking signs were inherently “inconsistent” with state law because they did not meet the state law standards for parking signs. CP 625, 634. The City therefore had no authority to issue and collect fines from the Drivers because illegal signs are not official traffic control devices. The trial court erred in not granting the drivers’ motion on this legal issue.

D. THE COURT SHOULD RULE THAT PRIVATE THIRD-PARTY IMPERIAL PARKING EMPLOYEES ARE NOT LAW ENFORCEMENT OFFICERS WITH THE AUTHORITY TO ISSUE TRAFFIC FINES.

The Drivers asked the trial court to enter partial summary judgment because the City uses private Imperial Parking employees to issue parking citations while Washington law only authorizes law enforcement officers to conduct traffic enforcement.¹³ CP 310. The City

¹² Under Wisconsin Rules of Appellate Procedure, Rule 809.23(3), this unpublished decision can be cited as persuasive authority. Citation to the decision is thus allowed here under GR 14.1(b).

¹³ A parking infraction is a traffic infraction. RCW 46.61.570; RCW 46.61.050.

argued the Drivers are wrong that “only a law enforcement officer can issue a [traffic] citation.” CP 419.

The trial court appeared to agree with the Drivers that only a law enforcement officer can issue a traffic fine. CP 630-34. The trial court was correct because the legislature provided that “a *law enforcement officer has the authority to issue a notice of traffic infraction.*” RCW 46.63.030(1) (emphasis added). And any enforcement not performed in accordance with RCW 46.63.030 is “invalid and of no effect.” RCW 46.08.020.¹⁴ Parking citations issued by non-law enforcement officers are thus “invalid and of no effect.” *Id.*

The trial court erred, however, in positing that Imperial Parking employees “could be considered” law enforcement officers. CP 633. Under Washington law and common understanding law enforcement

¹⁴ The City argued below that its Municipal Code authorizes it to use private contractors to issue traffic fines (CP 247-48), but RCW 46.63.030 provides the sole authority for issuing traffic citations and RCW 46.08.020 provides that RCW Title 46 takes “[p]recedence over local vehicle and traffic regulations”:

[N]o local authority shall enact or enforce any law, ordinance, rule or regulation in conflict with the provisions of this title except and unless expressly authorized by law to do so and any laws, ordinances, rules or regulations in conflict with the provisions of this title are hereby declared to be invalid and of no effect. (Emphasis added.)

Accord, State v. Magee, 167 Wn.2d 639, 642-43, 220 P.3d 1224 (2009) (The Supreme Court invalidated a traffic infraction because the infraction was not issued in accordance with RCW 46.63.030. The Supreme Court ruled that under RCW 46.63.030 “[a] law enforcement officer has statutory authority to issue a notice of infraction [only when] the infraction is committed in the officers presence...” Because “the trooper never saw [the defendant] operating his vehicle negligently. . . [t]he trooper did not have the authority to issue the notice of infraction.”) Thus, a ticket only has the authority of law if issued in compliance with RCW 46.63.030.

officers are public employees. As discussed below, the legislature's restriction of the contracting power of law enforcement agencies, the statutory scheme for the enforcement of traffic laws, and the civil service law for city police department employees all show that law enforcement officers are public employees.

A "law enforcement agency" is "any agency, department, or division of a municipal corporation . . . having as its primary function the detection and apprehension of persons committing infractions or violating the traffic or criminal laws[.]" RCW 10.93.020(1)-(2).¹⁵ The law enforcement agency here is thus the Bremerton Police Department. *Id.*

The trial court decided that the City's contracting with Imperial Parking to use Imperial employees to issue traffic fines "does not conflict with any statute" (CP 634). But the legislature has expressly restricted the Bremerton Police Department and other city law enforcement agencies from contracting out law enforcement functions. They may only contract with other law enforcement agencies. RCW 10.93.130. This statute, titled "Contracting authority of law enforcement agencies," states in full (*id.*):

Under the interlocal cooperation act, chapter 39.34 RCW, any law enforcement agency referred to by this chapter *may contract with* any other such agency and *may also contract*

¹⁵ Consistent with the definition of law enforcement agency, the Court of Appeals ruled that a "law enforcement officer" is an "*employee of a governmental entity[.]*" *State v. Stewart*. 43 Wn. App. 744, 746, 719 P.2d 184 (1986) (citation omitted) (emphasis added).

with any law enforcement agency of another state, or such state's political subdivision, to provide mutual law enforcement assistance. The agency with primary territorial jurisdiction may require that officers from participating agencies meet reasonable training or certification standards or other reasonable standards. RCW 10.93.130 (emphasis added).

By specifically providing Bremerton and other cities the limited authority to contract with other law enforcement agencies for law enforcement functions, the legislature did not authorize any other contracts. *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999). In *Landmark* the Supreme Court explained that under *expressio unius est exclusio alterius*, a canon of statutory construction, "the expression of one is the exclusion of others." *Id.* Therefore, where a statute specifically designates the things or classes of things upon which the statute operates, the legislature is deemed to have "intentionally omitted" the things or classes that are not included. *Id.*; *In re Det. Of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). Accordingly, because the legislature intentionally omitted authority for cities to contract with private corporations to enforce traffic laws, the legislature denied that authority. *Id.*

In addition, in RCW Title 46 the sole exception the legislature has made to the requirement that a "law enforcement officer" issue a traffic infraction is that a "law enforcement agency authorized to enforce parking laws may appoint volunteers, with a limited commission, to issue notices

of infractions” for violations concerning parking spots for disabled persons. RCW 46.19.050(10). In contrast, RCW Title 46 contains no authority to contract with a private company to conduct parking enforcement. Thus, the legislature’s sole specific statutory exception for volunteers to issue traffic fines also demonstrates that only law enforcement officers have authority to issue traffic fines under RCW Title 46. *Id.*; *Landmark Development*, 138 Wn.2d at 571.

Due to lacking any statutory authority to have private contractor employees issue traffic fines, the City and the trial court both looked to two limited statutory schemes regarding “fare enforcement” where the legislature allowed local governments to contract with private employees to issue civil infractions when passengers fail to pay transit fares. CP 630; CP 634 n. 47, *citing* RCW 35.58.585 (private fare collectors in municipal transit) and RCW 81.112.210 (private fare collectors for Sound Transit). But the legislature specifically authorized municipalities and regional transit authorities “to contract” for persons to have the “the powers of an enforcement officer [as] defined in RCW 7.80.040.” RCW 35.58.585(2)(a); RCW 81.112.210(2)(a). Rather than supporting the trial court’s decision, the statutes undercut the trial court’s decision because there is no corresponding legislative authorization to contract out traffic enforcement. *Landmark Development*, 138 Wn.2d at 571.

The rule that law enforcement officers must be public employees is

further confirmed by civil service statutes, which require law enforcement officers to be part of the civil service. RCW Ch. 41.12 (civil service for city police); RCW Ch. 41.14 (civil service for county police). All fully-commissioned, limited-commissioned (*e.g.*, parking enforcement officers), and non-commissioned employees in a city's police department are required to be in civil service positions. *Teamsters Food Processing Employees, Local v. City of Moses Lake*, 70 Wn. App. 404, 407, 853 P.2d 951 (1993), citing RCW 41.12.050. "[T]he general rule is that public services are to be performed wherever practicable by public employees" and that "[n]either a private individual nor a firm may be hired to perform the normal or routine duties of a public agencies." *Wash. Fed'n of State Employees v. Spokane Cmty. Coll.*, 90 Wn.2d 698, 702-03, 585 P.2d 474 (1978). If there is "no clear legislative expression" to allow the contracting out of a public service, the contract attempting to privatize that service is "void." *Id.*¹⁶ The courts thus "insist on scrupulous adherence to [civil service] laws and the policies they embody." *State Employees*, 90 Wn.2d at 704. Here, there is no exemption in the civil service laws allowing the City replace public employees issuing traffic fines with

¹⁶ See also *Wash. Fed'n of State Employees v. Joint Ctr. for Higher Educ.*, 86 Wn. App. 1, 6-10, 933 P.2d 1080 (1990) ("The legislature has been told by our Supreme Court that if it intends to create exceptions to the Civil Service Law, it must do specifically."); *Wash. Fed'n of State Employees v. DSHS*, 90 Wn. App. 501, 508-12, 966 P.2d 322, 966 P.2d 322 (1998) (contract was void because "the cases require a clear mandate in the enabling statute and/or require an amendment to the relevant civil service law to allow privatization of services historically performed by state civil service employees.").

private contractors. See RCW Ch. 41.12.¹⁷ Indeed, before the City contracted out issuing traffic fines, city employees in Bremerton's Police Department in Parking Regulator positions issued parking fines. CP 259-60.

Accordingly, the civil service statutes in RCW Ch. 41.12 also show that law enforcement officers must be public employees rather than private contractors because there is no legislative exception for Bremerton to exempt individuals issuing traffic fines from the civil service.¹⁸

In a similar situation, the California Attorney General was asked by a city if the city could contract with a private company to issue parking citations. 85 Ops. Cal. Atty. Gen. 83, 2002 WL 726359 (2002). The city hoped to save money by privatizing parking enforcement. *Id.* The California Legislature had "expressly authorized cities to contract with private companies to *process* parking citations" but "no specific authority

¹⁷ Because parking enforcement is performed by civil service police department personnel in cities throughout the State there are many Public Employment Relations Commission (PECB) decisions regarding parking enforcement employees. See, e.g., *City of Walla Walla*, Decision 10979 (PECB, 2011); *City of Seattle*, Decision 10946 (PECB, 2010); *City of Vancouver*, Decision 9469 (PECB, 2006); *City of Everett*, Decision 1883 (PECB, 1984).

¹⁸ The trial court understood the rule that if the legislature "intends to create exceptions to the Civil Service Law, it must do so specifically." CP 633, citing *Joint Ctr. for Higher Educ.*, 86 Wn. App. at 9-10. But the trial court then proceeded to turn the rule on its head by approving the City's practice because "the legislature has not prohibited" contracting out city police civil service positions. *Id.* The trial court is wrong because not only is there no specific exception for the City to privatize parking enforcement, but also because *the legislature has prohibited* the City's contracts by not providing a specific exception to civil service. See *supra* at 30-34.

has been given to cities to have the employees of private companies *issue* parking citations.” 2002 WL 726359, p. *2 (California Attorney General’s emphasis). Applying the rule that law enforcement officers must be public employees, the California Attorney General concluded that the City was not authorized to contract out parking enforcement without specific statutory authority because “it is for the Legislature to determine whether a city should be allowed to use private employees to issue parking citations, just as it has considered (and granted) the authority of a city to contract” for processing of parking fines. *Id.* at *3. The situation is the same here because our legislature has considered and granted authority to law enforcement agencies only to contract with other law enforcement agencies, not with private contractors. See *supra* at 32-33.

Because there is no statute authorizing the City to use private Imperial Parking employees to issue traffic fines, the trial court suggested that the Imperial Parking employees could possibly fit into the definition of law enforcement officer in RCW 9A.76.020, which concerns the crime of obstructing a law enforcement officer. CP 633. RCW 9A.76.020(2) states in full:

(2) “Law enforcement officer” means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those defined in RCW 10.93.020, and other public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.

The trial court said that Imperial Parking employees issuing traffic

finer could potentially be “limited authority peace officers” under RCW 9A.76.020. CP 633. The trial court is wrong because RCW 10.93.020, referred to by RCW 9A.76.020, defines “limited authority peace officers” as “full-time, fully compensated officer[s] of a limited authority Washington law enforcement agency,” and a limited authority law enforcement agency is a government agency or “unit of local government” that conducts law enforcement in “limited subject areas,” e.g., the Liquor Control Board.¹⁹ Imperial Parking employees are therefore not “limited authority peace officers” under Washington law.²⁰

The trial court also seemed to suggest that the *private* Imperial Parking employees could be *public officers* under RCW 9A.76.020(2) (CP 633):

While [RCW 9A.76.020(2)] does call [law enforcement officers] “public” officers, nothing in the definition restricts the commission for a limited purpose, and the “limited authority” could include those limited to parking enforcement.

¹⁹ RCW 10.93.020 also mentions “general authority” peace officers and “specially commissioned” peace officers. A “general authority Washington peace officer” is an “elected, appointed, or employed officer of a general authority Washington law enforcement agency.” *Id.* A “specially commissioned peace officer” is an out-of-state or federal police officer who has statutory authority to enforce makes arrests in Washington. *Id.*; RCW 10.93.090. As private employees, Imperial Parking employees are neither general authority peace officers nor specially commissioned peace officers.

²⁰ The Drivers are not arguing that only fully-commissioned general authority peace officers in Bremerton’s Police Department can issue traffic fines. The Bremerton Police Department can have employees with limited commissions, like those provided to the volunteers who enforce disability parking under RCW 46.19.050(10), to issue traffic citations, just as Bremerton’s Police Department used to employ “Parking Regulators” to perform this function. CP 259-60.

The trial court's reasoning is directly contrary to the Supreme Court's ruling in *State v. KLB*, 180 Wn.2d 735, 328 P.3d 886 (2014). In *KLB*, the Supreme Court ruled that a "fare enforcement officer" is not a "public officer." *Id.* at 743-45. The Supreme Court noted that, while municipalities and transit authorities had explicit statutory authority to contract with private employers for fare enforcement officers, these "statutory privileges do not transform Sound Transit FEOs (who in reality are Securitas employees) into public officers." *Id.* at 743-44. "[A]n 'officer' is a person holding office who performs a public function and who is vested with some sovereign power of government. As a private security officer, an FEO is not a public officer." *Id.* Imperial Parking employees are not "public officers." *Id.*

Accordingly, contrary to the trial court's decision that the City's use of Imperial Parking employees to issue traffic fines does not conflict with any statute (CP 634), in RCW Ch. 46 the legislature provided only "law enforcement officers" in a "law enforcement agency" the authority to issue a traffic citation. RCW 46.63.030(1); RCW 46.19.050(10). And the legislature expressly restricted Bremerton from contracting this work out except with other law enforcement agencies (RCW 10.93.130) or appointing volunteers to issue traffic infractions related to disability parking. RCW 46.19.050(10). These statutory restrictions on contracting out are confirmed by the requirement that all full-time employees in a

city's police department be in civil service. RCW Ch. 41.12. The trial court was thus wrong to conclude that the City's actions do not violate any statutes because the City's actions are contrary to all of these statutes.

Moreover, if the City were correct that it can, without any specific statutory authority, unilaterally authorize itself to contract for private parking enforcement, then the City could pass an ordinance allowing it to delegate or contract out many police functions, not just parking enforcement. Under the City's logic, it could ignore the statutory schemes of RCW Ch. 46.63, RCW Ch. 10.93, and RCW Ch. 41.12, and the City could have private contractors cite people for jaywalking or speeding. This would render meaningless the authorization that only "a law enforcement officer has the authority to issue a notice of traffic infraction" (RCW 46.63.030), the legislature's restrictions on law enforcement contracts in RCW Ch. 10.93, and the mandate that individuals in law enforcement be public employees in civil service. RCW Ch. 41.12. Because the tickets issued by Imperial Parking employees are not issued by "law enforcement officers," the tickets issued violate RCW 46.63.030 and are thus "invalid and of no effect." RCW 46.08.020.

Accordingly, the Court should rule that the City's use of private Imperial Parking employees to issue traffic fines is contrary to state law and fines issued by the private Imperial Parking employees are invalid.

E. THE DRIVERS ARE ENTITLED TO MONETARY AND INJUNCTIVE RELIEF.

After obtaining a partial summary judgment ruling that the City's blue parking signs violate state law, the Drivers moved for partial summary judgment on monetary relief and injunctive relief. CP 496-521. The trial court ruled that the Drivers were barred under res judicata from obtaining monetary relief and it denied injunctive relief because the City replaced its unlawful blue signs. CP 609.

The trial court's ruling that res judicata prohibits monetary relief here is wrong. See *supra* at 16-25.

The monetary relief that the Drivers seek flows mechanically from the trial court's ruling that the blue parking signs are unlawful and from the trial court's class certification order. The Drivers were damaged because the City imposed fines on the Drivers without lawful authority. See *supra* at 25-30. The amount of their damages is the fine, any associated penalties for late payment, and prejudgment interest. CP 521.

The trial court certified the class under CR 23(b)(2), which applies when the "party opposing the class has acted or refused to act on grounds generally applicable to the class to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole..." CR 23(b)(2); *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188, 157 P.3d 847 (2007). "Certification under subsection (b)(2) is [thus]

appropriate when injunctive or declaratory relief is requested, and when the defendant has acted or refused to act or failed to perform a legal duty on grounds generally applicable to the class.” *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 251, 63 P.3d 198 (2003); *accord, Nelson*, 160 Wn.2d at 188-90. Monetary relief is available in cases certified under CR 23(b)(2) where the monetary damages are “incidental” to the injunctive or declaratory relief. *Nelson*, 160 Wn.2d at 189. “Incidental damages” are those that “flow directly from liability to the class as a whole on the claims forming the basis for the injunctive or declaratory relief. *Id.* (citation omitted). Incidental damages are thus damages “to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established.” *Sitton*, 116 Wn. App. at 252 (citation omitted); *Nelson*, 160 Wn.2d at 189 (“Nelson’s claim for \$79.23,” the amount of tax he was unlawfully charged, “flows directly from Appleway’s liability”).

Here, the trial court certified the class under CR 23(b)(2). And the trial court made findings when it certified the class as to what the damages are here -- “the [monetary] amount any individual was fined” -- and the Court found these damages “mechanically flow from the . . . declaratory relief sought in this case.” CP 665. The Court thus certified the class under CR 23(b)(2) because the damages here are “incidental.” *Id.* Additionally, when the Drivers moved for summary judgment on damages, the City did not dispute that the damages could be objectively computed from the City’s records. *Cf.*

CP 509, 523-24, and 570-77; see *Nelson*, 160 Wn.2d at 189 (damages “cognizable by objective standards”). Accordingly, under CR 23(b)(2) the incidental damages here “flow directly from liability to the class” and the class members are “automatically” entitled to these damages. *Nelson*, 160 Wn.2d at 189; *Sitton*, 116 Wn. App. at 252.²¹

The Drivers are also entitled to monetary relief under the remedy of restitution. The remedy of restitution requires that the defendant provide plaintiffs the monetary proceeds the defendant retains from wrongdoing. *Nelson*, 160 Wn.2d at 187-88; *Moore v. Health Care Authority*, 181 Wn.2d 299, 314, 332 P.3d 461 (2014). For example, in *Nelson*, a class action, the Supreme Court held that the defendant car dealer violated a state statute by imposing its business and occupancy tax obligation on its customers. *Id.* at 180-81. Due to the defendant’s statutory violation, the defendant was required to return the money it gained by improperly imposing the tax because the money properly belonged to the plaintiffs. *Id.* at 188.

Here, the City admits the Court effectively granted declaratory relief

²¹ Even assuming *arguendo* that the Drivers’ request for a “refund” was barred by res judicata (which it is not) -- the trial court equated the term “refund” as an order requiring the municipal court to refund the fine (VRP 05/06/16 at 9) -- the fact that an order requiring the City to pay damages and/or restitution comes to the same monetary amount as a refund is not a defense because they are independent grounds for relief. The trial court understood this point. *Id.* It is well-settled that different measures of damages can result in the same amount of monetary relief: “Damages and restitution may happen to provide the same dollar recovery, but they are often triggered by different situations and always measured by a different yardstick.” 1 Dobbs, *Law of Remedies* §3.1 (2d ed. 1993); See also *Moore*, 181 Wn.2d at 303, 315 (approving multiple independent grounds for damages that all arrive at approximately the same monetary amount).

that the City's blue parking signs violate state law standards on sign color when it granted summary judgment on that issue. CP 492. The City therefore had no legal basis to collect fines for overtime parking in areas with blue signs and the City was unjustly enriched for collecting those fines. See *supra* at 25-30. Restitution requires that the City provide the Drivers the monetary proceeds that it received from its unlawful conduct so that it does not profit from the wrongdoing. *Nelson*, 160 Wn.2d at 173; *Moore*, 181 Wn.2d at 311-15.

The trial court also erred when it found the parties had agreed that the Drivers' request for injunctive relief was moot (CP 616) because the Drivers had specifically requested that the trial court enjoin the City from "collect[ing] any unpaid fines and/or penalties from class members" based on the illegal blue signs and did not agree that the City's voluntary removal of the illegal signs made their request for an injunction moot. CP 498.²² At the hearing on relief, class counsel again told the trial court that the Drivers' current "motion seeks declaratory relief, injunctive relief, and the monetary relief that flows from that declaratory and injunctive relief." VRP 02/06/16 at 4. In response to the trial court's questions, class counsel again told the

²² The fact that the City started removing the illegal blue signs after the trial court ruled the illegal blue signs violate state law did not deprive the trial court of jurisdiction to provide remedies, including injunctive relief. "Cessation of illegal conduct does not deprive a tribunal of the power to hear and determine the case; *i.e.*, it does not render the case moot. A court may need to settle an existing controversy over the legality of the challenged practices." *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 312, 553 P.2d 423 (1976).

trial court that the Drivers were seeking injunctive relief “as part of this motion.” *Id.* at 5-6. And class counsel specifically requested that the Court issue “the injunctive relief that’s still outstanding[.]” *Id.* at 14.

Accordingly, the trial court erred when it did not grant the Drivers’ injunctive relief and monetary relief. This Court should direct the trial court to award monetary relief pursuant CR 23(b)(2), *i.e.*, the fine, any penalties for late payment paid, and prejudgment interest, and to enjoin the City from collecting unpaid fines and/or penalties.

VI. CONCLUSION

The Court should reverse the trial court’s final judgment and decision granting summary judgment to the City because the Drivers have a cause of action to challenge the legality of the City’s traffic fines under the Washington Constitution, Article IV, section 6. The Court should hold that the Drivers’ claims are not barred by res judicata because (1) the Bremerton Municipal Court had no jurisdiction over the claims or to order the relief sought, and (2) it would be a manifest injustice to decide the Drivers’ claims are barred by res judicata when the claims raise issues of significant public importance and the Drivers did not have the financial incentive to litigate those issues in traffic court over a \$47 fine.


The Court should also rule that the City did not have authority to issue the traffic fines based on the illegal blue signs because they were not “official traffic control devices” as required by state law. The Court

should also rule that Imperial Parking employees do not have authority to issue traffic fines because they are not law enforcement officers. The Court should direct the trial court to enter partial summary judgment to the Drivers on these issues.

The Court should also direct the trial court to enter partial summary judgment to the Drivers on monetary and injunctive relief pursuant to CR 23(b)(2), *i.e.*, monetary relief in the amount of the illegal fines paid, any penalties for late payment, and prejudgment interest, and to enjoin the City from collecting unpaid fines and/or penalties. The trial court should also be directed to conduct all further proceedings in accordance with the Court's opinion.

Respectfully submitted this 2nd day of October, 2017.

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DECLARATION OF SERVICE

I, Claire Faltesek, declare under penalty of perjury that I am over the age of 18 and competent to testify and that the following parties were served as follows:


On October 2, 2017, I personally delivered a copy of the **Brief of Appellants** to the following parties by email:

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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: October 2, 2017, at Seattle, Washington.



Claire Faltesek, Legal Assistant

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